IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING CO., PETITIONER,

VERSUS

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Supreme Court of the United States:

Comes now your petitioner, The Creede and Cripple Creek Mining and Milling Company, and respectfully shows to this Honorable Court that heretofore and at the September term, A. D. 1902, the United States Circuit Court of Appeals of the Eighth Circuit, sitting at the city of St. Louis, in the state of Missouri, considered and determined a certain cause theretofore taken upon a writ of error from the Circuit Court of the United States within and for the District of Colorado, in which The Uinta Tunnel,

Mining and Transportation Company was plaintiff in error and The Creede and Cripple Creek Mining and Milling Company defendant in error.

That the said United States Circuit Court of Appeals, upon the hearing and determination of said cause, reversed the decision of said Circuit Court, as more fully appears in the records of the proceedings in said cause in said United States Circuit Court of Appeals, which are herewith offered for the consideration of the court, a certified copy of the entire record, in conformity with rule 37 of this Honorable Court, being submitted herewith.

Your petitioner is advised, and believes, that the said judgment of said United States Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination, under and in conformity with the provisions of the sixth section of an act of Congress entitled, "An act to establish certain courts of appeal and to define and regulate in certain causes the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891," the said cause being made final in the said Circuit Court of Appeals by the said act.

Your petitioner shows that in deciding said cause the said Circuit Court of Appeals not only ignored, but ran directly counter to certain principles of law heretofore adjudicated by this court in many cases, and more especially in Calhoun G. M. Co. vs. Ajax G. M. Co., 182 U. S., 499. That said cause was one involving a contest between lode mining claims and a tunnel location upon the public domain and a construction of the several statutes of the United States

relating thereto. That this case which your petitioner seeks to have review involves the identical questions which were passed upon by this court in the above-named cause, inasmuch as this is a controversy arising out of a conflict between a tunnel location and lode claims, and depends for its determination upon a state of facts similar to those which were considered by this court as the basis for its adjudication above mentioned.

Your petitioner, further, shows that the Circuit Court of Colorado determined the cause in keeping with the principles laid down by this court in Calhoun Co. vs. Ajax Co., supra, but that the Circuit Court of Appeals did not follow said rulings, but, upon the contrary, held, in conflict with this court, in the following particulars:

1. The tunnel of the plaintiff in error, as in the Calhoun-Ajax case, was not located until after the two lode claims, the Little Mary and Ocean Wave, through which it was driven, had been located, and though both of the lode claims had passed to patent long before this controversy arose, the United States Circuit Court of Appeals held, in violation of the rule laid down in Calhoun-Ajax case, that testimony might be introduced to show that at the time the tunnel location was made there had been no discovery of ore within the limits of the two claims, and by such testimony fix the date of the relation of the patents to the two claims, not to the date of their location, as announced by this court, but to the date of the subsequent discovery of mineral therein. The trial court having refused to permit such proof to be made, the Court of Appeals has reversed the cause and re-

manded it to the Circuit Court for a new trial, at which such testimony is to be admitted.

2. Your petitioner, further, shows that the said Circuit Court of Appeals ran counter to the decision of this court in its construction of sections 2322-3, Revised Statutes United States, in their relation, one with the other, by holding in this case that, notwithstanding a lode claim had passed to patent, yet, nevertheless, its title was still subject to the right of way of any tunnel which was located prior to the location of the lode claim or prior to the actual discovery of mineral therein, unless the claim had already been entered for patent in the land office.

3. Your petitioner, further, shows that the said Circuit Court of Appeals, in conflict with the rules of law laid down by this court, further held that, notwithstanding the absolute grant by the patent of the United States to the claim owner of all veins of every description apexing within his lines, a tunnel claimant was entitled to enter and enjoy certain of them, provided his tunnel was located prior to the location of the claim, or prior to the discovery of mineral therein, unless there had been an entry of the same for patent in the land office.

4. Your petitioner, further, represents that the Circuit Court of Appeals, in this cause, held and decided that, if at the time of the entry of a lode claim for patent, *the rights of an adverse tunnel claimant were so uncertain, contingent and intangible* as that, they could not be fairly litigated, he was not bound or concluded by the patent issued upon such entry.

Your petitioner, further, shows to this court that this case, being identical with the Calhoun-Ajax case,

remained upon the docket of the Circuit Court in and for the District of Colorado until this court should have passed upon said sections of the statute, their relation to one another and application to a controversy of this character. These questions having been determined by this court, they were relied upon by this petitioner, and said Circuit Court, as rules of law for their guidance in the determination of this case; and that in keeping therewith, those matters and things set forth in the answer of the plaintiff in error, which were in conflict with the said decision, were stricken out and the case tried and determined upon the issues remaining.

Your petitioner says that to permit the decision of the United States Circuit Court of Appeals to stand in this case would work a great hardship upon your petitioner by reason of the fact that it does not conform to the decisions of this court, and deprives your petitioner of all the advantages which it is entitled to thereunder. It would, furthermore, render the law so uncertain that both litigants and courts alike will be unable to determine what course to pursue in such cases.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Ap-

peals in the said case therein entitled The Uinta Tunnel, Mining and Transportation Company, appellant, and The Creede and Cripple Creek Mining and Milling Company, respondent, No. 1762, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled, "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever so pray.

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H. H. LEE,
Attorneys for the Petitioner.

STATE OF COLORADO, COUNTY OF ARAPAHOE,
CITY AND COUNTY OF DENVER, ss.

....., being first duly sworn, upon oath, deposes and says, that he is one of the attorneys for petitioner, The Creede and Cripple Creek Mining and Milling Company; that he

has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, information and belief.

.....

Subscribed and sworn to be before me this .... day of January, A. D. 1903.

My commission expires December 13, 1906.

....

Notary Public.

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THE CREEDE AND CRIPPLE CREEK MINING AND MILLING CO., PETITIONER,

VERSUS

THE UINTA TUNNEL, MINING AND TRANSPORTATION CO., RESPONDENT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In support of the petition for writ of certiorari, The Creede and Cripple Creek Mining and Milling Company relies upon the decision and opinion of this court in the case of Calhoun Gold Mining Company vs. Ajax Gold Mining Company, 182 U. S., 499, and the unbroken line of decisions upon which it is founded which establish the doctrine that a patent

to mining claims issued under the Federal Statutes relates back to the date of the location thereof, and is conclusive as to all facts and conditions to which its issuance is essential. The two cases involve the same questions of law, except that in the Calhoun-Ajax case was involved also the question of cross-lodes, which does not arise here. The properties in controversy in both cases are located in the same mining district, and the two causes were originally instituted in the same tribunal. This cause was transferred, on the ground of citizenship, to the United States Circuit Court for the district of Colorado, and there remained without being tried until the decision was handed down in the Calhoun-Ajax case. After that it was brought on for trial and determined in keeping with the decision in that cause, it having become a rule of property on which this petitioner had a right to rely.

This is a controversy between a tunnel claim and two patented lode claims, both of which were located prior to the date of the location of the tunnel. The tunnel claimants insisted upon their right, notwithstanding the two lode claims had passed to patent, to prove that on the date of the location of the tunnel claim there was no discovery of mineral in either of the lode claims, and that, therefore, the apparent priority of the lode claims could be attacked by parol testimony.

It was further contended by the tunnel claimant that if the tunnel was located before the discovery of mineral in the lode claims, that it was entitled to a right of way through the lode claims, even after they had passed to patent.

The plaintiff in error, among other defenses, alleged that there never was at any time a discovery of mineral within the Little Mary and Ocean Wave lode claims, but that the patents to the same had been obtained by some persons through fraud. These defenses, upon motion, were stricken out, and the only issue remaining being that of ownership upon the part of The Creede and Cripple Creek Mining and Milling Company, at the trial of the case, upon the introduction of patents of the United States and sufficient title deeds the court instructed a verdict in behalf of the defendant in error.

There are two important questions of law to be determined in deciding this case.

1. After a lode claim has been patented under section 2322, does section 2323 modify the preceding section, and give tunnel claimants either a right of way through or a right to blind veins within the limits of the patented lode claim?

2. After a lode claim has been patented, to what date does the patent relate, the date of the *location* of the claim, or some other date *to be fixed by parol testimony* without reference to the title or patent of the claim?

These are the most vital questions in the case, and the trial court, believing that they were decided definitely and directly by the decision in the Calhoun-Ajax case, ruled in the negative upon each of them. The United States Circuit Court of Appeals, however, notwithstanding the plain and explicit language of this court, finding a slight difference in the history of the titles of the lode claims in the Calhoun-Ajax

case to those in this case, differentiated between the two cases and reversed the decision of the court below. The only difference between the two cases being the point upon which the United States Circuit Court of Appeals relied is that in the Calhoun-Ajax case the two lode claims had been entered for patent before the tunnel location was made, while in this case, though the lode claims were located before the tunnel, they were not entered for patent until after the tunnel location was claimed to have been made. This court, however, did not base its opinion and decision in the Calhoun-Ajax case upon any such ground, but expressly say that the patents "*related back to the date of the locations of the claims.*"

This court, in considering one of the assignments of error in the Calhoun-Ajax case, says that it relates to

> "rights claimed by plaintiff in error by the location of the tunnel site, and presents the questions whether such location gave to the plaintiff in error the following rights of way through the lode claims of defendant in error, of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error."

In its brief the plaintiff in error disclaimed any right to any blind veins that might have been cut in the Ocean Wave and Little Mary claims, limiting its claim to the right of way through the two above mentioned claims for the purpose of mining properties situated beyond them, which was one of the proposi-

tions and contentions made and passed upon in the Calhoun-Ajax case. In discussing it this court said:

> "The plaintiff in error asserts the right of way for its tunnel under section 2323 by implication, and from that implication and the rule it contends for in cross veins, deduces its right to all the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. * * * And there can be no implication of conflict with the rights given by section 2322. *The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can section 2322 be given effect?* There are no exceptions to its language. The locators of any mineral vein, lode or ledge are given not only an exclusive right of possession and enjoyment of all the surface included within the lines of their locations, but of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically. A locator, therefore, is not confined to the vein upon which he based his location and upon which the discovery was made."

And again this court has said

> "The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defend-

> ant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado it is disposed of by their interpretation by the Supreme Court of Colorado."

This case and the Calhoun-Ajax case alike raised this question of the right to drive and operate a tunnel through the limits of a lode claim which has already passed to patent. The question as to the date of the relation of the patent does not and can not apply. If in the Calhoun-Ajax case, in which the relation of the two sections of the United States Revised Statutes above referred to was settled by saying that section 2322 gave exclusive rights, the full effect of which could not be qualified by the succeeding section, then the decision of the Court of Appeals remanding this cause for a new trial, that evidence might be taken, which, under any rule of construction of law or conclusion of fact, might permit the tunnel to be driven through these patented claims was in direct conflict with the law as defined by this court.

The Court of Appeals also held in its opinion that wherever a patent of a lode claim is based upon an entry in the land office, made after the location of a tunnel site across it, that it is subject to the rights of the tunnel in cases where such rights were so *uncertain, contingent and intangible* that they could not fairly be litigated when the application for patent was made. What this language may mean in its entirety it is impossible now to say, but one thing is does mean, and that is that a possessory title, notwith-

standing the repeated adjudications of the state and federal courts, under the mining law is nearly worthless, and it says also in unmistakable terms that a patent of the United States only relates back to the date of the application therefor, which is equally novel as a proposition of mining law. Never before have the *uncertainty* and *intangibility* of a claimant's right given them in the eyes of the law an additional value or permitted him to be lax or dilatory in their assertion. In the present case, however, the tunnel claimant asserts that his rights are certain and tangible and have existed and been perpetuated from a time prior to the inception of the rights of the lode claimant. The Rico-Aspen case is wholly dissimilar. There the conflict was unforeseen and unexpected. Here there was an adverse claim of right from the very beginning, one that it is claimed was never *uncertain* or *intangible*.

In addition to the foregoing the Court of Appeals held that entries and patents of lode claims in proceedings to which the claimant of a tunnel site located across them prior to the entries was not a party will not estop him from establishing by the testimony of witnesses who know the fact that no discovery of lodes was made in the claims before the tunnel site was located across them.

This is also an attempt to invoke the decision of this court in Enterprise Mining Company vs. Rico-Aspen Consolidated Mining Company, 167 U. S., 108, but that case was, in every particular, so different from the case at bar that it does not determine or decide any question at issue here.

The gist of the decision of the Court of Appeals is this: That, notwithstanding the decision of this court the patent does not relate back to the date of the location, but relates to some other date which shall be fixed by parol testimony. The evidence in this case showed the date of the location of the two patented claims and that it was prior to the alleged location of the tunnel. In the Calhoun-Ajax case this court said upon page 509 of the report:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented claims of the defendant in error, to wit, the Monarch and Mammoth Pearl. The ruling was right. *The patents were proof of the discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.*"

In the face of this language which, with the exception of the names of the two claims, is applicable literatim et verbatim to this cause, the Court of Appeals decided with this language before it that the patents did not relate back to the date of the location, but to some other date that might be fixed by parol testimony, provided it was a date prior to the day of entry. To show the uncertainty of such a holding we may be pardoned for asking whether proof that there was no discovery of mineral would be admissible only

for any day earlier than the day of entry, or would it be permissible under this doctrine to prove that there was no discovery of mineral even on the very day of entry, provided that proof related to some hour before the hour of filing? If this is the true doctrine, proof would first have to be made of the exact moment of the application in the land office, and, that being fixed, no period of time, however brief, prior thereto, if the evidence related only to it, would be inadmissible.

The dangerous absurdity of such reasoning is too obvious to require comment.

If the argument were further carried out, what infinitesimal period of time would the courts fix within which a patent might or might not be attacked prior to the date of the application therefor?

The reasoning of the Court of Appeals, if sound, is as applicable to the facts in the Calhoun-Ajax case as in this. For it is impossible to conceive of any reason whereby the distinction between the two cases can be entertained. "The issue," says that court, "whether the discoveries were made before location of the tunnel site in the Ajax company's case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims."

Is it not equally true that the same things were "necessarily considered and adjudged" by the same authority when it permitted the entries of the lode claims of the Creede and Cripple Creek Company? Can it be possible that it did not so "consider and adjudge" in this case, merely because *before the entry* the Uinta tunnel had been located, and that in the Ajax case it did so consider and adjudge merely be-

cause *after the entry* the Ithaca tunnel had been located?

"The finding that such discoveries had been before the date of the entries was indispensable to the decision that the lode claimants were entitled to make the entries, so that that finding must have been made by the department." To that we give hearty assent, and insist that it is equally true as to the entries here. But how does the Court of Appeals distinguish? That court continues:

> "But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries were made was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgment."

We are wholly unable to perceive the distinction. The action of the department is either conclusive, or it is not, and whether it is or is not surely can not be made to depend on the circumstance that the tunnel site, instead of being located after the location of the patented claim, was located after its entry. Such conditions would overthrow the permanency of all titles, and make them dependent on extraneous facts, liable to disclosure long after the evidence of their non-existence had been lost or destroyed.

Certainly the language above quoted could not have been more definite when the identity of the two suits in this particular is taken into consideration, and it should have been held conclusive in this case. Therefore, if it is true that the patent when granted relates back to the date of the location, how can any attack be made upon the title of the claim between the date of the location and the date of entry without its being an attack upon the patent. It has been so often held and so conclusively determined that a patent is proof of discovery that we are at a loss to understand how parol testimony questioning the discovery can be anything, also, but an attack upon the patent. If the patent, as a matter of law, relates back to the date of location, how is it possible or permissible by parol evidence to make it relate back to some other date?

If a patent relates only to the date of entry, then it grants only a fee indefeasible back to that date, while before that date it is open to question and attack, notwithstanding the United States has passed upon it and pronounced it perfect by its patent. If this be the rule, then the government grants only a fee in form, which may at the time be absolutely worthless, by reason of the existence of secret easements which years afterward may be successfully asserted. We are asked to believe that the government solemnly gives a patent to its mineral lands to a citizen, granting him the fee with the proviso that any one may have the right hereafter to prove an easement or right which will take all the ore and leave the fee an empty shell and a hollow mockery. And yet we are gravely told that this is not a collateral attack on a patent.

It may perhaps be said that the *patent* still remains. This may be true, perhaps, as to the paper part, the seals and the recitals, but of what use are these boasted guaranties if the minerals, which alone make the property valuable, can be seized upon by a flank movement and carried away?

The statutes of Colorado, as this court is well aware, provide a certain formula which must be observed in the making of the location of any mining claim. First, there must be a discovery within the limits of the claim, and within a specified time from the date of such discovery the location must be made. The law gives to the miner time from the date of the discovery of mineral to prospect his lode, determine its course and direction, its commercial or speculative value, and anything affecting its desirability as a mining property. He must then, if he so elect, inaugurate his location by filing a location certificate in the county clerk and recorder's office of the county wherein the lode is found. This location certificate must contain certain specified things—the name of the claim, the name of the locator, the date of the location, the number of feet in length, and a certain description by metes and bounds. It is the first public claim of the title of the locator which is recorded, and if it is based upon a discovery of mineral establishes a good title. When the government of the United States, through its proper department, afterwards grants a patent thereto, it is an adjudication not only that there was mineral discovered and disclosed within the claim at or before the date of the location, but that all of the acts necessary to segregate it from the public domain have been complied with. When

the title once becomes complete by the granting of patent it is and should be unassailable from location to patent. As this court has said, it has been decided too often to be necessary to cite authority in its support, but before leaving the subject we desire to refer to the texts of Judge Lindley, and of Barringer and Adams, and to make the two following quotations therefrom:

> "It is accepted, as a well-established rule of law, that the title conveyed by a mining patent relates back to the *inauguration* of the right; that is, to the *location* upon which the patent proceedings are based."
>
> Lindley on Mines, volume 2, page 975.

> "The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the *first initial step* in the acquisition of the title; that is, the *original location,* at least so far as to cut off intervening rights * * *."
>
> Barringer and Adams on Mines, page 417.

Also, in

> Davis, Admr. vs. Weibbold, 139 U. S., 530.

This court, in summing up a case, wherein there was a contest between a lode claim patented and a town site, said, speaking of the lode claim: "The patent which subsequently followed was a mere per-

fection of the right *originated by the location and to which it took effect by relation.*" And cited with approval several cases holding to the same rule.

The doctrine of relation which the Court of Appeals has asserted in this case, by holding that a patent relates only to the date of the application for the same, instead of the date of the location, was not invoked by the plaintiff in error in its answer. We contend that, it not having been pleaded or included within the parts of the answer which were stricken out, the appellate court was without authority to pass upon it, even though it was argued at length in the briefs. The only allegations in the answer which affected this matter were the bald assertions that these two claims were never at any time located or discovered by the locators, or any one else, *but that certain people managed by fraud to get a patent from the United States* therefor. There was no allegation in the pleadings that would serve as a basis for the decision of the Court of Appeals that there was no discovery, and therefore no sufficient location of the lode claims at the date of the location of the tunnel site. Certainly whatever the construction of the law may be, a defense that two claims patented by the United States government have never been properly located or discovered, and that the patents have been procured by fraud, when made collaterally, should not be allowed to stand, nor should an appellate court, when reviewing the proceedings by which they were stricken out, announce any doctrine as to the relation of the patents for justification of its decision.

This question as to the time of the relation of the patent is entirely an afterthought. At any rate it is not by any means similar to the matters and things which were stricken from the answer. There was no allegation that the discovery was made some time between the date of location and the issuance of patent, and that, therefore, the latter related to that date, but it was alleged that the Ocean Wave and Little Mary lode claims were not, and never were, either of them, located upon any discovery of vein or veins, and that no mineral vein was ever discovered or uncovered in the discovery shaft of either of them. It denied that the patent related back or took effect, either from the date of discovery or location, for any purpose or for all purposes, or that there was ever made, at any time, by any person, any location of these two claims. This was not an attempt to fix the time to which a patent might relate, but was an attempt, and the only one made by way of defense, to run counter to the express terms of the patent, and to tender as an issue the proof that it was fraudulently issued, without authority and without a proper basis in fact or in law for its support, and all this was sought to be done by collateral attack. These sections of the answer to which we have referred are the fifth and sixth paragraphs, pages 61-62, printed record.

If the decision of the Court of Appeals in this case, together with the accompanying opinion, is permitted to stand, in conflict, as it is, with the utterances of this court upon the same subject, it will produce

endless confusion, long and protracted litigation, to the great injury not only of the petitioner herein, but to other litigants and mine owners throughout the United States.

All of which is respectfully submitted.

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